FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

June 9, 2000

OFFICE OF
THE CHAIRMAN

The Honorable Van Hilleary
U.S. House of Representatives
114 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Hilleary:

I am pleased to have this opportunity to answer your questions regarding the Commission's "Competitive Networks" initiative to facilitate the development of telecommunications competition in multiple tenant environments. On July 7, 1999, the Commission released its *Notice of Proposed Rulemaking* (*NPRM*) in WT Docket No. 99-217 and CC Docket No. 96-98. Among other things, the *NPRM* sought comment on the Commission's authority to take action to ensure that competitive telecommunications service providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments.

The *NPRM* represents one step in the Commission's ongoing efforts to foster competition in local telecommunications markets pursuant to Congress' directive in the Telecommunications Act of 1996. These efforts are intended to bring the benefits of competition, choice, and advanced services to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises. In particular, this item addresses issues that bear specifically on the availability of facilities-based telecommunications competition to customers in multiple tenant environments, such as apartment buildings, office buildings, office parks, shopping centers, and manufactured housing communities.

The purpose of this item is to explore broadly which actions the Commission can and should take to promote facilities-based competition to the incumbent local exchange carriers (ILECs). The item seeks comment on a wide range of potential Commission actions, in most instances without reaching any specific conclusions. For example, the item neutrally seeks comment on the legal and policy issues raised by a possible requirement that building owners who allow one or more telecommunications carriers access to facilities that they control make comparable access available to other carriers on a nondiscriminatory basis. The item also requests comment on whether the Commission can and should extend to providers of telecommunications service rules prohibiting restrictions on the placement of antennas used for over-the-air reception similar to those adopted for video programming services under Section 207 of the 1996 Telecommunications Act. In addition, the item proposes and seeks comment on potential obligations on ILECs and other public utilities to permit access to their in-building facilities under certain provisions of the Communications Act of 1934. Finally, the *NPRM* seeks

comment on whether telecommunications providers, with or without market power, should be prohibited from entering into exclusive contracts with owners of multi-tenant buildings.

I will now address each of your questions in turn.

Question 1: Under what statutory authority does the FCC have power to make this kind of rule that would give telecommunications providers the right to enter properties without first negotiating the right to do so with the property owner?

Answer: In the *NPRM*, the Commission identified several potential statutory bases for imposing limited access requirements on owners of multiple tenant environments. The Commission asked whether the use of in-building facilities to provide interstate and foreign communication is within its subject matter jurisdiction to regulate under Title I of the Communications Act. In this regard, the Commission cited Sections 1 and 2(a) of the Act, which permit the Commission to enforce the Act with respect to "all interstate and foreign communication by wire or radio;" and Section 3 of the Act, which broadly defines radio and wire communications to include "all instrumentalities, facilities, apparatus and services . . . incidental to" such communications. The Commission also sought comment regarding its authority under Sections 224 and 251(c) of the Act to require utilities to provide competitive telecommunications carriers with reasonable and nondiscriminatory access to utility-owned or controlled rights-of-way, and facilities that are located in multiple tenant environments. Under Section 224, utilities are required to provide telecommunications carriers and cable television systems with nondiscriminatory access to "any pole, duct, conduit, or right-of-way owned or controlled by [the utility];"and under Section 251(c)(3), incumbent local exchange carriers ("LECs") are required to provide telecommunications carriers with nondiscriminatory access to network elements on an unbundled basis. Finally, the Commission sought comment on whether Sections 4(i) and 303(r) of the Communications Act – which authorize the Commission to take such action as may be necessary to perform its duties and carry out the purposes and provisions of the Act – provide the Commission with authority to require building owners who give any carrier access to their premises to make comparable access available to all such carriers under nondiscriminatory rates, terms and conditions.

The Commission received numerous comments in response to the *NPRM*, arguing both in favor and against Commission jurisdiction. The Commission is currently evaluating the record on the scope of its statutory authority to require access to multiple tenant environments.

Question 2: Wouldn't this represent a "taking" and thus open the Federal government to huge payments to property owners?

Answer: In the *NPRM*, the Commission also sought comment on the "taking" issue. Under the Fifth Amendment the government may not effect a taking of private property without just compensation. The Supreme Court has ruled that a state requirement that building owners provide access to install equipment to certain cable television service providers constitutes a permanent physical occupation of the landlord's property that amounts to a *per se* taking for which just compensation is constitutionally required. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The Commission's proposals in the *NPRM*, however, would not mandate access, but would only apply if the property owner had already granted a telecommunications provider access to the property. Some commenters have argued that a nondiscriminatory access requirement may not constitute a *per se* taking. Other commenters have disagreed. The constitutionality of governmental action that does not rise to the level of a *per se* taking is evaluated under the three-part regulatory takings analysis first outlined in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Under this analysis, some commenters assert that the nondiscrimination requirements described in the *NPRM* would not constitute a taking because the requirements would further the public interest, would have minimal economic impact, and would not undermine investment-based expectations.

Commenters have also addressed the Federal government's potential liability in the event a taking is determined to have occurred. Some commenters have argued that building owners would have a Tucker Act-remedy against the United States, exposing it to enormous financial liabilities for the uncompensated fair market value of property taken as determined under a Fifth Amendment analysis. Others have argued that this exposure is small because, among other reasons, the Commission is contemplating regulations that would ensure that property owners receive just compensation.

The Commission is reviewing the record in order to assess carefully and decide correctly these complex and novel constitutional issues.

Question 3: I have been advised that the Public Service Commission in Florida did a study of this issue and concluded that there was no need for any legislation since the study concluded it was a non-problem. Could you please inform me of which FCC studies actually show whether or not this type of legislation is needed in the market?

Answer: Consistent with the Telecommunications Act mandate to foster competition in local telecommunications services, the *NPRM* sought comment on whether new

rules are necessary to achieve that goal. The Commission will fully consider all studies that are part of the record in determining whether regulations are necessary to ensure competitive access to multiple tenant environments.

Question 4: Would a forced access rulemaking pertain to all government buildings, including the Pentagon and the FCC?

Answer: The *NPRM* sought comment on access to all multi-tenant buildings and did not exclude government buildings from consideration. We are considering all comments in the record on this issue.

Question 5: What safeguards are you contemplating to allow a property owner to expel a provider from the property if that provider promises to deliver, but fails to fulfill that promise? What immediate remedies will be available to a property owner or apartment manager?

Answer: If the Commission decides that a rule governing access to multiple tenant environments is appropriate, then it will consider what remedies should be available to address providers that fail to live up to their contractual commitments.

Question 6: Many apartment markets have high turnover rates. In your opinion, does that demonstrate that residents have a right and ability to receive any type of service they want by choosing to live in communities that offer the services they want?

Answer: Some commenters argue that turnover rates in apartment communities demonstrate that residents have sufficient power to obtain the services that they want. Other commenters argue that the costs of moving effectively obstruct many consumers from exerting power over building owners. The Commission is considering these comments.

Question 7: How do you foresee the rulemaking handling a situation where 20 different providers show up at a new property? Would the property owner be subject to sanctions if he refuses to prohibit any one of the providers access to the property? What are the responsibilities of the property owner if the technology changes within a couple years, but there is no more room left on the property to accommodate the new technology and the existing provider refuse to upgrade the technology?

Answer: The Commission is sensitive to the concerns of apartment community owners regarding potential limits on building capacity to accommodate multiple providers. If the Commission decides that a rule governing access to multiple tenant environments is appropriate, then it will consider how the rule should be crafted to address these concerns.

Finally, I should note that the "Competitive Networks" *NPRM* is a pending proceeding and the Commission has not reached any conclusions regarding the matters discussed in the *NPRM*. The Commission currently is reviewing nearly 1000 comments that were filed on the *NPRM* and a related *Notice of Inquiry* by telecommunications companies, electric utilities, building owners, and State and local governments, including a number of comments that address the constitutional issues. Let me assure you that we are committed to ensuring that any requirements we adopt comport with the Fifth Amendment. To this end, our General Counsel's office is working closely with other Commission staff to evaluate carefully the constitutional issues raised by the *NPRM*, including any potential for government liability under the "just compensation" provision of the Takings Clause. I want to assure you that our staff will be considering carefully these important and complex constitutional issues, as well as other legal and policy issues raised by the *NPRM*, before it makes its recommendations to the Commission for its consideration. We have placed your letter for consideration in the record of this proceeding.

I appreciate your interest and participation in this proceeding. Please let me know if I can be of further assistance.

Sincerely,

William Kennard

William E. Kennard
Chairman

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FEDERAL COMMUNICATIONS COMMISSION
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The Honorable William Kennard
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1919 M Street NW
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Dear Chairman Kennard,

I am very concerned about a possible rulemaking by the FCC regarding allowing telecommunications companies to get forced access onto private property. I strongly support a competitive telecommunications market. However, I also strongly favor protecting the rights of private property owners. I would find it very useful if you could provide me with answers to several questions I have listed below.

1. Under what statutory authority does the FCC have the power to make this kind of rule that would give telecommunications providers the right to enter properties without first negotiating the right to do so with the property owner?

2. I your opinion, would this action represent a "taking" and thus open the Federal government to huge payments to property owners?

3. I have been advised that the Public Service Commission in Florida did a study of this issue and concluded there was no need for any legislation since the study concluded it was a non-problem. Could you please inform me of which FCC studies actually show whether or not this type of new regulation is needed in the market?

4. Would a forced access rulemaking pertain to all government buildings, including the Pentagon and the FCC?

5. What safeguards are you contemplating to allow a property owner to expel a provider from the property if that provider was not dependable or not innovative? What if a provider promises to deliver, but fails to fulfill that promise? What immediate remedies will be available to a property owner or apartment manager?

6. Many apartment markets have high turnover rates. In your opinion, does that demonstrate that residents have a right and ability to receive any type of service they want by choosing to live in communities that offer the services they want?

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7. How do you foresee the rulemaking handling a situation where 20 different providers show up at a new property? Would the property owner be subject to sanctions if he refuses to prohibit any one of the providers access to the property? What are the responsibilities of the property owner if technology changes within a couple years, but there is no more room left on the property to accommodate the new technology and the existing provider refuse to upgrade the technology?

Thank you for your attention to this important matter and I look forward to your responses to these questions.

Sincerely,

Van Hillear
Member of Congress

VH:rm